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No. 96-270

In the Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,

v.

GEORGE WINDSOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CHEMICAL MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CHEMICAL MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America (Chamber) and the Chemical Manufacturers Association (CMA) move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari.

The Chamber is the largest federation of business, trade and professional organizations in the United States. The Chamber represents more than 215,000 companies, several thousand trade and professional organizations, and state and local chambers of commerce. The Chamber regularly participates as *amicus curiae* in civil cases raising issues of national concern to the business community. CMA is a

non-profit trade association whose member companies represent 90 percent of the production capacity for basic industrial chemicals in the United States. CMA's members include many major American corporations, as well as numerous other companies. Some of the petitioner companies are members of the Chamber and/or CMA.

Many CMA and Chamber members have been, and in various cases presently are, defendants in putative class actions. Those cases have involved a wide assortment of claims; examples include products liability, securities, tort, and antitrust allegations. In some of these cases, the parties may be able to negotiate a settlement to their dispute before the district court decides whether the class should be certified for the purpose of litigating the claims asserted in the complaint. The present case raises the question of how the Rule 23 standards for class certification should be applied in such circumstances.

The conflicting answers given to that question by the courts of appeals will have dramatically different consequences for the parties to federal court class actions. Accordingly, regardless of which of those answers is deemed to be correct by this Court, many Chamber and CMA member companies have a strong interest in having the Court resolve that inter-circuit conflict. As long as that conflict persists, many companies will be deterred from undertaking the major investment of time and resources needed to negotiate and gain approval of class action settlements. If the Third Circuit's view is wrong, numerous settlements will have been needlessly and expensively lost. Alternatively, if the Third Circuit's interpretation is ultimately upheld, any companies that do undertake such settlement efforts while the conflict

persists may ultimately find that they have wasted their -- and the courts' -- time and resources.

CMA and the Chamber therefore have a strong interest in informing the Court of the significance of the issue presented by this case, and of the conflict among the circuits, on the interests of the American business community, including companies within the chemical manufacturing industry. Petitioners have consented to the filing of this brief. However, while consent was granted by a number of other parties, consent was refused by Iona Cunningham et al., Kathryn Toy, American Re-Insurance Company et al., and Protective National Insurance Company et al. The Chamber and CMA therefore request leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the largest federation of business, trade and professional organizations in the United States. The Chamber represents more than 215,000 companies, in addition to numerous other organizations and local chambers of commerce, and participates as *amicus curiae* in civil cases raising issues of national concern to the business community. The Chemical Manufacturers Association (CMA) is a non-profit trade association whose member companies represent

90 percent of the production capacity for basic industrial chemicals in the United States. CMA's members include major American corporations as well as numerous other companies within the chemical manufacturing industry. Some of the petitioners are also Chamber and/or CMA members.

Many CMA and Chamber member companies have been, and in various cases presently are, defendants in cases initiated by class action complaints. Those cases have asserted allegations on a wide array of matters, such as products liability, securities, tort, or antitrust claims. In some of these putative class actions, the parties may be able to reach a settlement before the district court decides whether the class should be certified for the purpose of litigating the claims set forth in the complaint. The present case raises the question of how the standards for class certification set forth in Federal Rule of Civil Procedure 23 should be applied in such circumstances.

The conflicting answers given to that question by the courts of appeals will have dramatically different consequences for the parties to federal court class actions. Moreover, the existence of that circuit split will have significant adverse consequences for both litigants and the judicial system as long as it remains unresolved. Accordingly, many CMA and Chamber members have a strong interest in having this Court grant the petition and resolve the inter-circuit conflict over the issue presented herein.

REASONS FOR GRANTING THE PETITION

The question presented by this case is whether, in a putative class action where the parties have entered into a settlement prior to class certification, the court must ignore the existence of that settlement in applying the standards for class

certification set out in Rule 23. As shown in the certiorari petition, the Third Circuit's answer to that question is squarely in conflict with the decisions of the other circuit courts that have addressed this question.[1] As we now show, regardless of which interpretation of Rule 23 is correct, it is essential that this Court resolve that conflict without delay.

1. The question of whether a district court presented with a pre-certification settlement must ignore that settlement in applying the standards for class certification is one that has often arisen, and will continue frequently to arise, in a wide variety of cases -- the vast majority of which have nothing to do with asbestos litigation. American companies are frequently the targets of putative class actions. For the past 20 years and more, parties have negotiated, and courts have approved, pre-certification class action settlements resolving a wide array of such cases.

For example, in the chemical manufacturing industry, an order certifying a class "for settlement purposes" was employed in 1975 to settle a series of cases against chemical manufacturers that alleged a nationwide conspiracy to fix the prices of chemical dyestuffs. See *Dorey Corp.*, 1975-2 Trade Cases ¶ 60,576 (S.D.N.Y. 1975). Subsequently, various courts have taken the fact of settlement into account in certifying classes and consensually resolving claims against

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[1] The circuits themselves have explicitly recognized the conflict. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 795, 798-99 (3d Cir.) (stating "disagree[ment]" with other circuits), cert. denied, 116 S. Ct. 88 (1995); *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996) (observing that "[o]nly the Third Circuit has refused to look at settlements before it when deciding class certification issues").

chemical companies relating to such matters as alleged exposure to pesticides, silicone gel breast implants, and morning sickness medication.[2] Most recently, just last month, a class was preliminarily certified for the purpose of settling claims against a number of chemical manufacturers by hemophiliacs alleging injury from exposure to the HIV virus. See *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, MDL-986 and 93-C-7452 (N.D. Ill. Aug. 14, 1996). Notably, a year ago, the Seventh Circuit had reversed an order that had certified essentially the same class for purposes of litigation. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

Similarly, as set forth on pages 10-15 of the petition, courts have taken settlement into account in certifying classes for the purpose of consensually resolving claims against numerous other kinds of companies. In short, the issue presented here affects a broad cross-section of American businesses and is of national concern to the business community.

2. Because the conflicting ways in which the courts of appeals interpret and apply Rule 23 in such circumstances will have dramatically different consequences for the parties to federal court class actions, it is essential that this Court act swiftly to minimize the adverse effects of that conflict. In the wake of the uncertainty raised by the Third Circuit's con-

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[2] See, respectively, *Woodward v. NOR-AM Chem. Co.*, 1996 U.S. Dist. LEXIS 7372 (S.D. Ala. May 23, 1996); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994); and *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4, 241 (S.D. Ohio), *rev'd on other grounds*, 749 F.2d 300 (6th Cir. 1984).

flicting decision, some -- but not all -- class action plaintiffs and defendants naturally will be deterred from seeking to negotiate and secure approval of class action settlements.

If the other Circuits' interpretation of Rule 23 is ultimately adopted by this Court, the deterrent effect of the Third Circuit's decision will have seriously injured litigants, courts, and the public. For example, class action settlements like the ones cited above -- which fairly, expeditiously, and efficiently resolve large numbers of claims in a single proceeding -- will be foregone or substantially deferred. Instead, those claims will have to be litigated at enormous cost and burden for all concerned. Thus, a prompt definitive ruling by this Court is essential to minimize the chilling effect of the Third Circuit's decision if that decision proves to be wrong.

If, on the other hand, the Third Circuit's interpretation of Rule 23 is ultimately adopted by this Court, the parties who nevertheless have proceeded in the meantime with efforts to negotiate and gain approval of class action settlements outside of the Third Circuit will in many cases find that they have wasted their, and the courts', time and resources. This is so because the class certifications in those cases will have to be reconsidered from scratch -- this time ignoring the proposed settlement -- and in many cases will have to be reversed. The resulting lost time and resources will be large indeed. For example, the settlement in this case required over a year of intensive negotiations (App. 113a-115a), and the process of judicial review involved a nationwide notice program costing millions of dollars (App. 216a-219a), a five-week fairness hearing in the district court (App. 101a), and the district court's time and effort required to research and prepare opinions totaling hundreds of pages (*e.g.*, App. 88a-

276a). Thus, a prompt definitive ruling by this Court is likewise essential to minimize the waste of time and resources if the Third Circuit's decision proves to be right.

Immediate review by this Court also is warranted because the merits of the Rule 23 issue have been fully explored by the courts of appeals. With respect to the Third Circuit's interpretation, that court's view is set out in a lengthy opinion in the *General Motors* case, and that opinion was confirmed by the panel in this case, with the full Third Circuit denying rehearing in banc (with a dissent). On the other side, the Fifth Circuit recently reaffirmed its contrary view of Rule 23 in the *In re Asbestos Litigation* case, and numerous decisions dating back some 20 years have also catalogued the reasons for interpreting Rule 23 to authorize settlement class actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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